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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 1100 Misc.

KALMAN GREENHILL AND FRANK PROCTOR, JR., PETITIONERS

v.

RICHARD T. RIVES, BEN F. CAMERON AND GRIFFIN B. BELL, CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

Petitioners were convicted, after a jury trial in the United States District Court for the Northern District of Alabama, for mail fraud and use of the mails in the

fraudulent sale of securities. Greenhill was sentenced to imprisonment for three years and Proctor to imprisonment for two years. The convictions were affirmed on appeal, 298 F. 2d 405, and a petition for a writ of certiorari was denied by this Court, 371 U.S. 830.

After the petition for a writ of certiorari was filed but before action thereon, petitioners filed in this Court a motion to vacate the judgment and remand the cause to the district court for a new trial, or to the court of appeals for reconsideration, on the ground that the arguments of counsel had not been recorded by the court reporter. They annexed to their motion an affidavit by the court reporter to the effect that, in accordance with the then usual practice in his district, he did not record the arguments of counsel. Petitioners' Motion to Vacate and Remand, No. 145, this Term, pp. 1a–2a. In opposing the motion, the government appended affidavits of the reporter and deputy clerk stating that the reporter was present in the courtroom during the arguments of counsel for the purpose of noting objections by either side and any ruling which the court might render thereon, and that no such objection was made. Memorandum for the United States in Opposition to Motion to Vacate and Remand, pp. 5–6. The government pointed out that, although petitioners were appellants in the courts below and responsible for presenting to that court the record on which they wished the cause to be judged, no issue as to the reporter's failure to record the argument of counsel had been raised in their motion for a new trial, or on appeal, or in their

petition for certiorari, even though petitioners' brief in the court of appeals had been filed after the decision of the Fifth Circuit in *Stephens* v. *United States*, 289 F. 2d 308, holding it reversible error for the court reporter to fail to record, *inter alia*, the arguments of counsel to the jury, *Id.*, pp. 1–3. The government argued that in view of the absence of objection at the trial to the argument of counsel, in view of the failure to raise any issue with respect thereto on appeal, and in the light of the overwhelming evidence against petitioners, the attempt to claim plain error under Rule 52, F.R. Crim. P., was unconvincing. *Id.*, pp. 3–4 On October 8, 1962, this Court denied the motion to vacate and remand, as well as the petition for a writ of certiorari. 371 U.S. 830.

On October 15, 1962, petitioners sought leave to file a second petition for rehearing in the court of appeals, based upon the reporter's failure to record the arguments of counsel. This motion was denied on November 26, 1962 (Pet. 5).

Petitioners then filed in the district court a petition in the nature of a writ of error *coram nobis* for a new trial, alleging that the failure of the reporter to record the arguments of counsel infected the fairness of the appellate process because the appellate court would be unable to correct any plain error by the prosecutor. The district court determined that it could not hear the matter until and unless the court of appeals granted permission for the filing of the application (Pet. App. 2a–3a). Petitioners then applied to the court of appeals for permission to file the motion in the district court or in the court of appeals. Leave

was denied on January 4, 1963 (Pet. 1a–2a). Petitioners seek review of that order by petition for a writ of certiorari (No. 859) or, in the alternative, they ask leave to file a petition for a writ of mandamus directing the court of appeals to grant permission to the district court to hear the application for writ of error *coram nobis* (No. 1100 Misc.).

ARGUMENT

Despite petitioners' attempt to label their various papers as applications for writs of error *coram nobis* their motions amount to no more than an attempt to reargue a point which they could have raised, but did not raise, on appeal in the court of appeals, which they did raise before this Court on their motion for remand, but which this Court did not consider of sufficient merit to warrant a remand of the cause; and which they again unsuccessfully raised before the court of appeals on their second motion for rehearing. Since petitioners' motion in the district court in effect sought to have the district court overrule the judgment of the court of appeals affirming the conviction and denying a second motion for rehearing, the district court properly refused to consider the matter without permission from the court of appeals. To do so would have been in violation of the mandate of the court of appeals. And the court of appeals properly declined to grant such permission, both because petitioners presented no valid ground for such relief and because petitioners were asking that court to grant relief which this Court had ruled was not a basis for a motion to remand the cause to that court or the district court.

Whatever the scope of the relief available under an application for a writ of error *coram nobis* and whatever the procedure to be followed, a matter we discuss below, these issues are not really presented by the facts of this case. Petitioners are merely attempting to relitigate matters which have been adjudicated against them.

1. As this Court indicated in its decision in *United States* v. *Morgan*, 346 U.S. 502, the writ of error *coram nobis* has been used infrequently in federal courts and its exact limits cannot be stated with precision. The effect of the *Morgan* decision, we believe, is to grant to one who is not in custody under the sentence attacked[1] a remedy for fundamental defects substantially equivalent to that which would be available to a prisoner in custody, formerly under habeas corpus and now by motion under 28 U.S.C. 2255. Relief available by way of *coram nobis* may be as broad as that under habeas corpus or 28 U.S.C. 2255, but it is certainly no broader. Neither the issue as to argument of counsel nor the question of the failure of the reporter to record the argument present matters cognizable under 28 U.S.C. 2255 or habeas corpus.[2] In *Sunal* v. *Large*, 332 U.S. 174, this Court held that a defendant who did not appeal from his

[1] It is questionable whether petitioners are in a position to resort to the remedy in view of the fact that the mandate in the criminal proceeding could be carried into effect immediately and petitioners would then be in custody under the judgment in the criminal case, which could be attacked collaterally only by a motion under 28 U.S.C. 2255.

[2] None of the cases cited by petitioners hold that the failure to record a portion of the trial is a ground for collateral attack on a judgment.

conviction could not by habeas corpus challenge the error of the trial court in declining to receive evidence which, under later decisions, might have constituted a defense to the charge. The claimed error here is much less serious and there is no excuse for not noticing it sooner. Indeed, the underlying complaint respecting the argument of government counsel could have been made at the trial, and the issue of the failure of the reporter to record the argument could have been raised on appeal. It was petitioners' responsibility to present to the court of appeals the record on which they wished the case to be judged. Had they wished to raise an issue as to arguments of counsel, they might have urged the failure to record them as a ground for new trial, as did the appellants in the cases cited by petitioners. In any event, having belatedly presented the question to this Court in their motion to remand and to the court of appeals in their second petition for rehearing, they cannot use *coram nobis* to relitigate the issue.

2. It is not entirely clear whether, after a conviction has been affirmed on appeal, permission to file a writ of error *coram nobis* should be obtained from the court of appeals before the district court may entertain such a motion. This was the rule at common law. See *Strang* v. *United States*, 53 F. 2d 820, 821 (C.A. 5). The *Morgan* decision does not settle the question since the judgment there under attack was entered on a plea of guilty from which no appeal had been taken. Perhaps, by considering *coram nobis* the equivalent of habeas corpus or 28 U.S.C. 2255, the opinion indicates that no permission would be necessary. The Sixth

Circuit so held in *Chereton* v. *United States,* presently pending before this Court in No. 780, this Term.[5] Nevertheless, in this case, where petitioners were making essentially the same contentions as had been made to this Court and the court of appeals, which had denied relief, the district court would seem to have been justified in deferring to the court of appeals. In any event, since the court of appeals has correctly held that the writ of error *coram nobis* does not lie in the premises, it is immaterial on what basis the district court reached the correct conclusion that there should be no hearing on petitioners' application.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari or for leave to file a petition for mandamus should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1963.

[5] The opinion of the court of appeals at 309 F. 2d 197, affirming the denial of the writ, shows merely that an application had been made to the court of appeals. Our files indicate, however, that the court ruled that permission from that court was not necessary. The issue raised by the application had not, however, as in this case, already been presented to the court of appeals.

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